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No. ____

In The Supreme Court
of the
United States

October Term, 1999

LANCE E. FARR,
Petitioner,
vs.
NC MACHINERY CO.,
Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This Petition For Writ of Certiorari presents only one issue for review. That issue is the following:

> Whether workers other than an employer's own employees are members of the class of persons protected by the safety and health regulations promulgated under the Occupational Safety and Health Act (OSHA), and the sections of OSHA which require employers to comply with those regulations.

LIST OF PARTIES

The parties to this proceeding are plaintiff/appellant/petitioner Lance E. Farr and defendant/appellee/respondent NC Machinery Co., a Washington corporation.

RULE 29.1 STATEMENT OF RELATED CORPORATIONS

Petitioner Lance E. Farr is a private individual. He is a member of the Kevleen K LLC, a limited liability company which owns the fishing vessel Kevleen K. However, he brings this action in his individual capacity. NC Machinery is a d/b/a of Tractor and Equipment, Inc., a privately held corporation. Insofar as counsel are aware, Tractor and Equipment, Inc. does not have any parents, subsidiaries, or affiliated entities.

TABLE OF CONTENTS

JURISDICTION IN THE COURTS BELOW 2

REPORTS OF OPINIONS BY OTHER COURTS 2

JURISDICTION OF THE SUPREME COURT 3

CONSTITUTIONAL, STATUTORY AND OTHER AUTHORITY INVOLVED 4

STATEMENT OF THE CASE 8

A. Statement of Facts 8
B. The Decision of the District Court 10
C. The Decision of the Court of Appeals 11

REASONS FOR GRANTING THE WRIT 12

A. The Court Should Accept Review To Resolve A Conflict Among The Circuits 12
B. The Distinction Between OSHA Sections 654(a)(1) and 654(a)(2) 14
C. The Second, Eighth, and Ninth Circuits 16
D. The Fourth and Fifth Circuits 19
E. The Sixth and Seventh Circuits 21
F. The D.C. Circuit 24

CONCLUSION 24

TABLE OF AUTHORITIES

FEDERAL CASES

Anthony Crane Rental, Inc. v. Reich,
70 F.3d 1298 (D.C.Cir.1995) 24

Barrera v. E.I. DuPont de Nemours & Co.,
653 F.2d 915 (5th Cir. 1981) 21

Beatty Equipment Leasing v. Secretary of Labor,
577 F.2d 534 (9th Cir. 1978) 18, 21, 23

Brennan v. Gilles & Cotting, Inc.,
504 F.2d 1255 (4th Cir. 1974) 13, 19, 21

Brennan v. OSHRC and Gerosa, Inc.,
491 F.2d 1340 (2d Cir. 1974) 13

Brennan v. Occupational Safety and Health Review Commission,
513 F.2d 1032 (2d Cir. 1975) 13, 16, 17
21, 23

Exxon Company, U.S.A. v. Sofec,
54 F.3d 570 (9th Cir. 1995), affd, 517 U.S. 830 (1996) 10

Horn v. C.L. Osborn Contracting Co.,
591 F.2d 318 (5th Cir. 1979) 21

IBP, Inc. v. Herman,
144 F.3d 861 ..... 20, 24

Marshall v. Knutson Construction Company,
566 F.2d 596 (8th Cir. 1977) 19

Martin v. OSHRC,
499 U.S. 144 (1991) 19

Melerine v. Avondale Shipyards,
659 F.2d 706 (5th Cir. 1981) 12, 20, 21, 23

Southeast Contractors, Inc. v. Dunlop,
512 F.2d 675 (5th Cir. 1975) 21

Teal v. E.I. DuPont De Nemours and Co.,
728 F.2d 799 (6th Cir. 1984), citing 29 U.S.C. 651(b) 13, 15, 21, 23

United States v. Pitt-Des Moines, Inc.,
168 F.3d 976 (7th Cir.1999) 15, 22

FEDERAL STATUTES

29 C.F.R. 1915.1, et seq. 2, 4, 6
29 C.F.R. 1915.3(d) 16

28 U.S.C. 1254(1) 3
28 U.S.C. 1291 2
28 U.S.C. 1333(1) 2
29 U.S.C. 651-700 1
29 U.S.C. 651 ..... 4, 18
29 U.S.C. 651(b) 4, 12, 13, 14
29 U.S.C. 654(a)(1) 4, 14, 15, 17, 22
29 U.S.C. 654(a)(2) 4, 13, 14, 15, 16, 17, 18, 20, 22, 23, 24
29 U.S.C. 655 6
29 U.S.C. 669 13
29 U.S.C. 670 13
29 U.S.C. 673 13
33 U. S.C. 941 6

MISCELLANEOUS

White & Carney, *OSHA Comes of Age: The Law of Work Place Environment*, *28* Bus. Law. *1309 (1973).* 12

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PETITION FOR WRIT OF CERTIORARI

This is a personal injury action brought by Petitioner Lance Farr against respondent NC Machinery. Farr prays for issuance of a writ of certiorari to review the decision filed by the Ninth Circuit Court of Appeals on August 6, 1999. In particular, Farr seeks review of the portion of the decision which holds that NC Machinery cannot be held negligent per se for violation of safety regulations promulgated pursuant to the Occupational Safety and Health Act (OSHA), 29 U.S.C. §§651 – 700, because Farr was not the employee of NC Machinery.

JURISDICTION IN THE COURTS BELOW

Farr was injured while he was serving as master of the fishing vessel KEVLEEN K, and the vessel was moored at a dock in navigable waters undergoing repairs. The injuries occurred when one of the ship's engines fell on him while being lifted out of the vessel by NC Machinery. Farr brought this action under general maritime law. The District Court exercised subject matter jurisdiction pursuant to 28 U.S.C. §1333(1). The District Court entered final judgment in favor of NC Machinery on September 26, 1997. Farr filed his Notice of Appeal on October 8, 1997. The Court of Appeals exercised jurisdiction pursuant to 28 U.S.C. §1291.

REPORTS OF OPINIONS BY OTHER COURTS

Farr contended that NC Machinery was negligent per se because the method which it had employed to rig the engine for lifting violated load safety factors mandated by the Safety And Health Regulations for Shipyard Employment, 29 C.F.R. §§1915.1 et seq., promulgated pursuant to OSHA. The District Court entered final judgment in favor of NC Machinery on September 26, 1997 (A-1),[1] on the basis of Findings of Fact and Conclusions of Law (A-3) bearing the same date. The District Court specifically declined to make a finding as to why the engine fell. Farr moved the court to appoint an expert under Federal Rule of Evidence 706 to determine whether NC Machinery had rigged the engine for lifting in a manner that violated the Safety And Health Regulations for Shipyard Employment. In another order dated September 26, 1997 (A-17), the District Court denied Farr's motion.

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[1] The citation "A-1" refers to page 1 of the Appendix hereto.

Farr argued on appeal that the District Court had erred as a matter of law by failing to make findings of fact as to why the engine fell or whether NC Machinery had violated the Safety Regulations for Shipyard Employment, by failing to find that NC Machinery was guilty of negligence per se, and by holding that Captain Farr's claim against NC Machinery was barred by superceding fault. In a decision filed August 6, 1999 (A-19), the Court of Appeals reversed the District Court's decision that Farr's claim against NC Machinery was barred by superseding fault. The Court remanded the case to the District Court for findings as to the existence and proportion of NC Machinery's negligence. However, the Court of Appeals ruled that NC Machinery could not be held negligent per se, because the OSHA regulations upon which Farr's claim was based applied only to the employees of NC Machinery. Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, Farr petitioned for rehearing with respect to the Court's ruling that NC Machinery could not be held negligent per se. NC Machinery also petitioned for rehearing. By order dated September 14, 1999 (A-35), the Court denied both petitions without opinion.

JURISDICTION OF THE SUPREME COURT

This Petition for Writ of Certiorari seeks review of the portion of the Court of Appeals' Decision filed August 6, 1999 (A-19) concerning the nature of NC Machinery's liability for violating the Safety And Health Regulations for Shipyard Employment. In particular, this Petition seeks review of the Court of Appeals' ruling that NC Machinery cannot be found negligent per se in Farr's action, because the regulations apply only to NC Machinery's own employees. This petition invokes the jurisdiction of the Supreme Court under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND OTHER AUTHORITY INVOLVED

The issues raised by this Petition For Writ Of Certiorari concern the obligations of employers under the general and special duty sections of OSHA, 29 U.S.C. §654(a)(1) and (2), which are based in turn on provisions of OSHA directing the promulgation of safety standards, and portions of the Safety And Health Regulations for Shipyard Employment, 29 C.F.R. §§1915.1 – 1915.1450, which pertain to load safety factors.

The applicable provisions of OSHA are the following:

§ 651. Congressional statement of findings and declaration of purposes and policy

(a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources –

***

(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under this chapter;

***

(9) by providing for the development and promulgation of occupational safety and health standards;

§ 654. Duties of employers and employees

(a) Each employer –

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

The Safety and Health Regulations for Shipyard Employment are found at 29 C.F.R., Part 1915. The specific provisions relied upon by Farr are at 29 C.F.R. §§1915.1, (2)(a), 3, 4(c)-(d), 112(b) – (c), and 113(a). The text of those provisions is as follows (emphasis added):

§ 1915.1 Provisions and authority.

The provisions in this part constitute safety and health regulations issued by the Secretary pursuant to section 41 of the Longshoremen's and Harbor Workers' Compensation Act, as amended (33U.S.C. 941) and occupational safety and health standards issued by the Secretary pursuant to section 6 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655).

§ 1915.2 Scope and application.

(a) Except where otherwise provided, the provisions of this part shall apply to all ship repairing, shipbuilding and shipbreaking employments and related employments.

§ 1915.3 Responsibility.

***

(c) The term employer means an employer, any of whose employees are employed, in whole or in part, in ship repairing, shipbuilding, shipbreaking or related employments as defined in this section on the navigable waters of the United States, including dry docks, graving docks and marine railways.

(d) The term employee means any person engaged in ship repairing, ship building, shipbreaking or related employments on the navigable waters of the United States, including dry docks, graving docks and marine railways, other than the master, ship's officers, crew of the vessel, or any person engaged by the master to repair any vessel under 18 net tons.

§ 1915.112 Ropes, chains and slings.

(a) *Manila rope and manila rope slings.* (1) Table G-1 in §1915.118 shall be used to determine the safe working load of various sizes of manila ropes and manila rope slings at various angles, except that higher sale working loads are permissible when recommended by the manufacturer for specific, identifiable products, **provided that a safety factor of not less than five (5) is maintained.**

(b) *Wire rope and wire rope slings.* (1) Tables G-2 through G-5 in §1915.118 shall be used to determine the safe working loads of various sizes and classifications of improved plow steel wire rope and wire rope slings with various types of terminals. For sizes, classifications and grades not included in these tables, the safe working load recommended by the manufacturer for specific, identifiable products shall be followed, **provided that a safety factor of not less than five (5) is maintained.**

§ 1915.113 Shackles and hooks.

(a) *Shackles.* (1) Table G-10 in § 1915.118 shall be used to determine the safe working loads of various

sizes of shackles, except that higher safe working loads are permissible when recommended by the manufacturer for specific, identifiable products, **provided that a safety factor of not less than (5) is maintained.**

STATEMENT OF THE CASE

A. Statement of Facts: The engine which fell on Farr was the diesel engine which powered the ship's generators. The engine failed while the vessel was sailing from Seattle to Alaska to participate in the Pribiloff crab season. Farr called ahead to notify the NC Machinery facility in Dutch Harbor, Alaska, of the engine failure. NC Machinery had a new engine which would bolt up the KEVLEEN K's generator. It was therefore decided to replace the old engine with the new one rather than rebuilding the old one.

NC Machinery had only one mechanic available to work on the job within the vessel's time frame. It was therefore necessary for the ship's crew to assist in moving things on and off the vessel, including the defective engine and its replacement. NC Machinery admitted at trial that it is extremely common for ships' crews to be involved in that type of work when vessels are in for repairs.

In order to be removed from the vessel and replaced, the engine had to be lifted through the opening where the engine room ladder ascended to the main deck. The engine was more than four feet long and weighed about 1,000 pounds. The NC mechanic bolted a lifting link into the engine block to assist in lifting the engine. The mechanic used a half-inch grade 8 bolt with 13 threads. The grade 8 bolt was inserted into the cast iron block a distance of .06 inches, and was torqued to 70

lbs. That bolt was the only suspension point by which the engine was lifted..

When the engine reached the base of the engine room ladder, the NC mechanic directed the ship's crew to connect a chain, or come-a-long, from the lifting link to an overhead winch. The engine was then lifted with force applied from the winch. Because the winch was not located directly overhead, it was necessary to attach another come-a-long which ran laterally into the engine room and could be used to hold the engine away from the ladder and other ship's structures as it was being lifted.

The NC mechanic was in charge of the lifting operation. He personally rigged the engine for lifting, selected the pick points at which the come-a-longs were attached to the engine, and attached the lifting link that was being used to raise the engine. He instructed the ship's engineer, a Mr. Graybeal, to run the overhead winch while Farr operated the lateral come-a-long from a sanitation platform in the engine room. He guided the engine as it was being raised, and directed the operation of the come-a-longs by Farr and Mr. Graybeal. He stood alongside the engine and rocked it back and forth to keep it from becoming snagged as it was being raised.

Farr became concerned during the lift that the outboard side of the engine would strike and damaging the vessel's alarm panel as the NC mechanic was rocking it from the inboard side. Farr therefore moved to a position from where he could see the panel. He did not touch the engine or the rigging. After checking the panel he started to back away. Suddenly and without warning the threads in the engine block bolt hole stripped. The lifting bolt pulled out of the bolthole and the

engine fell. It struck the engine room stairs, bounced, then came to rest on Captain Farr.

There was substantial evidence that the engine fell because the NC Machinery mechanic had rigged it for lifting with an inadequate load safety factor. Farr called two expert witnesses who testified that the safety factor of a lift is the ratio of the strength of the lifting configuration divided by the load placed upon it. The experts testified that under the Safety Regulations for Ship Repairing quoted above, the safety factor was required to be equal to or greater than 5. In this case it was substantially less than 5. When the bolt was torqued into the engine block bolthole to attach the lifting link, a sheer stress was created which put a load of 8,400 pounds on the threads within the bolthole. Lifting the engine raised the load to 9,400 pounds because of the weight of the engine. The strength of the threads within the bolthole would have been about 14,000 pounds under optimal conditions. The safety factor for the load was therefore no more than 14,000/9,400, or about 1.5 – far less than the factor of 5 required by the OSHA regulations. Moreover, Farr's experts testified that the theoretical safety factor of 1.5 assumed optimal conditions. The actual conditions were less than optimal for a variety of reasons, including significant wear and corrosion within the bolthole selected by the NC mechanic. The engine fell because the threads within the bolthole were not strong enough to bear the combined stresses placed upon them by the torquing of the bolt into the hole and the weight of the engine.

B. The Decision of the District Court: Farr contended that because the load safety factor was less than the factor of 5 mandated by OSHA regulations, NC Machinery was negligent per se. The District Court refused to make findings regarding Farr's contention. Relying on Exxon Company,

U.S.A. v. Sofec, 54 F.3d 570 (9th Cir. 1995), aff'd 517 U.S. 830 (1996), the District Court held that NC Machinery could not be held liable regardless of why the engine fell, because Farr's negligence in approaching the engine to check the alarm panel was the superceding cause of his injuries:

> Yet I do not have to decide why the bolt pulled out of the engine, and therefore make no finding, because I find that plaintiff's actions in stepping immediately adjacent to the engine block while it was being lifted could not have been anticipated, and were the sole proximate cause of the accident.

See, p.6, ¶3 of the District Court's Decision (A-13).

C. The Decision of the Court of Appeals: The Court of Appeals reversed the District Court's finding that Farr's negligence was the superceding cause of his injuries, and remanded the case to the trial court for further findings as to NC Machinery's negligence. However, the Court ruled that NC Machinery could not be held negligent per se for violating the OSHA regulations pertaining to load safety factors.

Neither the District Court, the Court of Appeals, nor even NC Machinery contested the basic proposition that:

> To establish that a defendant's violation of a statute or regulation is negligence per se, a plaintiff must prove "the violation of a statute which is intended to protect the class of persons to which the plaintiff belongs against the risk of the type of harm which has in fact occurred...The threshold issue, therefore, is whether [the injured worker] was a member of the class that the OSHA regulations were intended to protect.

Melerine v. Avondale Shipyards, 659 F.2d 706, 710 (5th Cir. 1981). The Court of Appeals ruled instead that Farr was not within the class of persons the OSHA regulations were intended to protect, because Farr was not NC Machinery's employee. The Court's entire opinion with respect to negligence per se is confined to the following paragraph of its decision (A-32):

> Plaintiff also argues that there was negligence per se because of violation of the OSHA safe place to work requirements, but this argument is without force because the regulation only applies to employers with respect to their employees, not to non-employment relationships such as NC's to Captain Farr.

This Petition for Writ of Certiorari involves the question of whether Section 654(a)(2) of OSHA and the OSHA regulations are intended to protect workers who are not employed by the employer which is required to comply with the applicable regulations, but who are at the same work site and might foreseeably be injured if the regulations are violated.

REASONS FOR GRANTING THE WRIT

A. The Court Should Accept Review To Resolve A Conflict Among The Circuits: OHSA is an exceedingly wide-ranging statute which has been characterized by one commentator as "the most revolutionary piece of 'labor' legislation since the National Labor Relations Act." White & Carney, OSHA Comes of Age: The Law of Work Place Environment, *28 Bus.Law 1309 (1973).* It was enacted by Congress with the express purpose of assuring "so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. §651(b) (Supp.1974). The motivation for OHSA was a "legislative record which

showed that each year 14,500 workers died and two million were disabled because of their jobs, resulting in $1.5 billion in lost wages and an $8 billion loss to the GNP. See Subcommittee on Labor, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970, 831, 844 (Comm. Print 1971); Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1259 (4th Cir. 1974). Congress intended by enacting OSHA to "encourage reduction of safety hazards to employees 'at their places of employment.'" 29 U.S.C. §651(b)(1); Brennan v. Occupational Safety and Health Review Commission, 513 F.2d 1032, 1038 (2d Cir. 1975).

Although OSHA provides for various governmental actions such as research and related activities (29 U.S.C. §669), training and employee education (29 U.S.C. 670), and the compilation of statistics (29 U.S.C. §673), "the bulk of the Act and the extensive legislative history are concerned with the promulgation of health and safety standards for private employers, and administrative and judicial enforcement procedures." Brennan, supra, 504 F.2d at 1259. The Secretary of Labor has therefore promulgated a vast array of safety standards that permeate nearly every segment of the American workplace. These regulations "are intended to be the primary method of achieving the policies of the Act." Brennan, *supra*, 513 F.2d at 1038, citing 116 Cong.Rec. 38371 (1970) (remarks of Congressman Steiger); Brennan v. OSHRC and Gerosa, Inc., 491 F.2d 1340, 43 (2d Cir. 1974).

The safety standards promulgated pursuant to OSHA are enforced under the authority of Section 654(a)(2), which places upon the "employer" the specific duty of complying with the OHSA safety regulations. Section 654(a)(2) "represents the primary means for furthering Congress' purpose of promoting the safety of the workplace." Teal v. E.I.

DuPont De Nemours and Co., 728 F.2d 799, 804 (6th Cir. 1984), citing 29 U.S.C. §651(b). At the many work sites where multiple employers operate, Section 654(a)(2) applies by placing the duty to comply with a particular regulation upon the employer who has control over the condition to be regulated. For example, if the regulation involves scaffolding, the duty of compliance is placed upon the employer who controls the scaffolding. If the regulation involves load safety, as in this case, the duty of compliance is placed upon the employer who controls the lift.

Despite the extraordinary importance of OSHA and the pervasive nature of OSHA regulations, there is substantial uncertainty under the law about which employees are entitled to the protections provided through Section 654(a)(2). It is more than foreseeable that workers other than an employer's own employees may be injured or killed if, for example, scaffolding fails or a load is dropped because the employer has not complied with the applicable OHSA regulations. Even though such workers fall within the zone of danger created by violation of the regulations, there is substantial disagreement among the circuits as to whether they should be allowed within the legal zone of interests to be protected by them. Pursuant to Rule 10 of the Supreme Court Rules, entitled "Considerations Governing Review on Certiorari", the Court should grant certiorari to resolve the conflict among the circuits and eliminate this very significant area of uncertainty in the law.

B. The Distinction Between OSHA Sections 654(a)(1) and 654(a)(2): In the present case, the Court of Appeals based its ruling on the general duty section of OSHA, 29 U.S.C. §654(a)(1). However, the general duty is only one of the duties placed upon employers by Section 654. The other is the specific duty imposed by Section 654(a)(2). The

relationship between the general and specific duties of Section 654 was analyzed in United States v. Pitt-Des Moines, Inc., 168 F.3d 976, 982-83 (7th Cir.1999) (emphasis added):

> The first duty [under Section 654(a)(1)] requires employers to protect their own employees from obvious hazards even when those hazards are not covered by specific safety regulations imposed by the Act. This duty is considered general because it asks employers to protect employees from all kinds of serious hazards, regardless of source. Although general, the words "his employees" indicate that the duty imposed by 654(a)(1) is limited to an employer's own employees. Section 654(a)(2), on the other hand, contains no such limiting language. Courts have interpreted this provision as imposing a specific burden on employers to comply with and carry out the Act's safety standards **regardless of whom in a given workplace is threatened by non-compliance**. Unlike Section 654(a)(1), which imposes a general duty to a specific class, 654(a)(2) implies a specific duty to a more general class. Thus, courts have held that **when an employer on a work site violates a safety regulation, it can face liability under the Act regardless of whether those exposed to the resulting danger were the employer's own employees or those of another**.

In this case Farr alleged violation of specific standards contained in the Safety and Health Regulations For Shipyard Employment. The reliance placed by the Court of Appeals on Section 654(a)(1), the general duty clause, was therefore misplaced. Teal v. E.I. DuPont De Nemours and Co., *supra*, 728 F.2d at 804. Farr's claim is instead governed by Section 654(a)(2). *Id.* Farr contends that under Section 654(a)(2), the

breach of a specific safety regulation constitutes negligence per se as to any worker who might foreseeably have been injured thereby and who was in fact injured.

Thus, as a master and member of the crew of the Kevleen K, Farr was barred by 29 C.F.R. §1915.3(d) from being considered the "employee" of NC Machinery. However, Farr was clearly within the zone of danger created by NC Machinery's violation of the load safety regulations. Moreover, NC Machinery admitted at trial that crewmembers frequently assist in such repair operations and are therefore frequently within the zone of danger. Farr therefore contends that since Section 654 and the OSHA regulations were expressly intended not only to protect workers from hazards created by their employers, but also to insure the safety of workers where they work, he is within the class of persons protected by the regulations. That is precisely the issue about which the circuits disagree.

C. The Second, Eighth, and Ninth Circuits: Before the conflict among the circuits became manifest, the Second, Eighth, and Ninth Circuit Courts Of Appeals held that the protected class under Section 654(a)(2) includes workers other than the responsible employer's own employees. The leading case was the decision of the Second Circuit Court of Appeals in Brennan v. Occupational Safety and Health Review Commission, *supra*. Brennan concerned a subcontractor involved in the construction of an apartment building. The subcontractor was cited under Section 654(a)(2) for violating OSHA regulations by storing construction materials on upper floors without exterior walls in such a manner that they hung out over the edge, endangering workers underneath who were not employed by the subcontractor. The Administrative Law Judge vacated the citations on the ground, *inter alia*, that the

subcontractor's own employees were not shown to have been exposed to the hazard. The Occupational Safety and Health Review Commission upheld the decision of the Administrative Law Judge. The Secretary of Labor petitioned for review on the ground, *inter alia*, that "proof of direct employee exposure to a hazard is not necessary to prove a violation of the Act...." 513 F.2d at 1035. The Court of Appeals held, reversing the Commission, that:

> in a situation where, as here, an employer is in control of an area, and responsible for its maintenance, we hold that to prove a violation of OSHA the Secretary of Labor need only show that a hazard has been committed and that the area of the hazard was accessible to the employees of the cited employer or those of other employers engaged in a common undertaking.

513 F.2d at 1038. The holding in applies squarely to the present case. NC Machinery and members of the ship's crew were engaged in the common undertaking of removing the engine from the engine room. The operation was being conducted under the control of NC Machinery's employee. The Court stated in Brennan that:

> This specific duty [under Section 654(a)(2)] to comply with the Secretary's standards is in no way limited to situations where a violation of a standard is linked to exposure of *his* employees to the hazard. It is a duty over and above his general duty [under Section 654(a)(1)] to his own employees....

513 F.2d at 1038 (emphasis in the original). The Court therefore held in Brennan that employers such as NC Machinery are required to protect all employees engaged in the

undertaking, not just their own employees, from the hazards which the OSHA Regulations are designed to prevent.

Brennan was followed by the Ninth Circuit Court of Appeals in Beatty Equipment Leasing v. Secretary of Labor, 577 F.2d 534 (9th Cir. 1978. Ironically in view of the decision of the present panel, Beatty is one of the leading cases for the rule that an employer which violates an OSHA regulation can be held liable under Section 654(a)(2) to workers other than its own employees. Beatty involved a materialman who was hired by the general contractor at an apartment construction site to erect a tubular-welded frame scaffold on the site. The materialman violated OSHA regulations by failing to install midrails. About a week after the materialman's own employees had left the site, an OSHA inspector observed the violation and issued a citation to the materialman under Section 654(a)(2). An Administrative Law Judge vacated the citation on the ground that the materialman's own employees were not exposed to the hazard. The Occupational Safety and Health Review Commission reversed the decision of the ALJ and reassessed the penalty. The Court of Appeals affirmed the Commission's decision. The Court specifically adopted the rationale of Brennan by stating that:

> It facilitates the broad remedial purpose of the Act, which Congress declared is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. §651. As this court has stated, "Congress clearly intended to require employers to eliminate all foreseeable and preventable hazards." We agree with the Commission that this policy can best be effectuated by placing the responsibility for hazards on those who create them.

577 F.2d at 537, citations omitted.

Likewise in Marshall v. Knutson Construction Company, 566 F.2d 596 (8th Cir. 1977), the Eighth Circuit Court of Appeals held that a general contractor violated Section 654(a)(2) by failing to protect employees of a subcontractor from hazards created by violations of OSHA regulations in connection with scaffolding which the subcontractor had erected. The Court stated:

> The duty of a general contractor is not limited to the protection of its own employees from safety hazards, but extends to the protection of all the employees engaged at the worksite.

566 F.2d at 599.

D. The Fourth and Fifth Circuits: In Brennan v. Gilles & Cotting, Inc., *supra*, the Secretary of Labor cited a general contractor for violations of OSHA regulations which resulted in the deaths of two workmen employed by a subcontractor. The Occupational Safety and Health Review Commission vacated the citation because the general contractor was not the employer of the deceased workmen. On review, the Fourth Circuit Court of Appeals deferred to the determination of the Commission on the ground that the word "employees' as used in the applicable regulation was ambiguous, and the choice of how it should be interpreted was committed to the Commission in the first instance. Insofar as the court deferred to the Commission's interpretation of the regulation rather than the Secretary's, its opinion has been overruled by Martin v. OSHRC, 499 U.S. 144 (1991). Moreover, the Commission later changed its position and began to endorse the Secretary's efforts to impose multi-

employer liability in cases governed by Section 654(a)(2). See, generally, IBP, Inc. v. Herman, 144 F.3d 861, 866 D.C.Cir.1999). Since Brennan, the Fourth Circuit has not considered the question of whether Section 654(a)(2) and the OHSA regulations are intended to protect workers other than the employer's own employees.

In Melerine v. Avondale Shipyards, Inc., *supra*, the Fifth Circuit Court of Appeals considered and rejected the decisions cited above from the Second, Eighth, and Ninth Circuits. In Melerine, a shipowner hired a shipyard to convert its vessel from a cargo carrier to an oil-drilling ship. The shipowner hired various other contractors to assist in the project, including an outfitter which was hired to equip the vessel. An employee of the outfitter sued the shipyard for injures which he received while assisting in the movement of a mooring bit across the deck of the vessel with a crane operated by an employee of the shipyard. The outfitter's employee contended that the shipyard should be held negligent per se because the crane operator violated OSHA regulations which required the use of tag lines and a qualified signalman in moving the bit. The district court held that the shipyard was not negligent, and the Court of Appeals affirmed. Citing Brennan, Beatty, and Teal, the Court stated:

> Whether OSHA regulates only the obligation of the employer to provide safe work conditions for his employees or also states a standard of care due third persons has been the subject of "complex dispute." Some courts have held that, given the language of OSHA's clauses on the duties of employers, OSHA's broad statement of purpose, and OSHA's generally broad language, OSHA regulations protect not only an employers *own* employees, but *all* employees who may

> be harmed by the employer's violation of the regulations.

659 F.2d at 710 (emphasis in the original). The Court stated, however, that "This court, however, along with others, has held that OSHA regulations protect only an employer's own employees." 569 F.2d at 710-11, citing Brennan v. Gilles & Cotting, Inc., *supra*. Citing Southeast Contractors, Inc. v. Dunlop, 512 F.2d 675 (5th Cir. 1975), Horn v. C.L. Osborn Contracting Co., 591 F.2d 318, 321 (5th Cir. 1979), and Barrera v. E.I. DuPont de Nemours & Co., 653 F.2d 915, 929 (5th Cir. 1981), the Court concluded that:

> In this circuit, therefore, the class protected by OSHA regulations comprises only the employers' own employees.

659 F.2d at 712.

E. The Sixth and Seventh Circuits: The Sixth and Seventh Circuit Courts Of Appeals have considered and rejected the decision by the Fifth Circuit Court Of Appeals in Melerine. In Teal v. E.I. DuPont De Nemours and Company, *supra*, the Sixth Circuit Couret of Appeals chose instead to follow the decisions in Beatty , Brennan, and Marshall. Teal involved a worker employed by a construction company that had been hired by DuPont to dismantle one of its plants. The worker was injured in a fall from one of DuPont's ladders. The worker sued DuPont on the theory that DuPont's ladder violated regulations promulgated under OSHA, and that DuPont's breach constituted negligence per se as to him. As in Melerine, DuPont argued that its duty under Section 654 ran only to its own employees. Citing Melerine, the Court stated that:

> Although DuPont's legal position is not without support, we believe that an employer's duty to comply with OSHA regulations is broader than DuPont suggests.

728 F.2d at 803. The Court of Appeals distinguished between the general duty imposed by Section 654(a)(1) to maintain a safe workplace, and the specific duty imposed by Section 654(a)(2) to comply with the OSHA regulations. The Court then stated:

> If the special duty provision is logically construed as imposing an obligation on the part of employers to protect all of the employees who work at a particular job site, then the employees of an independent contractor who work on the premises of another contractor must be considered members of the class that Sec.654(a)(2) was intended to protect.

728 F.2d at 804. The Court concluded:

> Consistent with the broad remedial nature of the Act, we interpret the scope of intended beneficiaries of the special duty provision in a broad fashion. In our view, once an employer is deemed responsible for complying with OSHA regulations, it is obligated to protect every employee who works at its workplace.

728 F.2d at 805.

The most recent case on point is United States v. Pitt-Des Moines, *supra*, decided by the Seventh Circuit Court of Appeals in February of 1999, which involved an ironworker who was killed on a post office construction project in Chicago when portions of the steel structure collapsed because a steel

erection subcontractor had violated OSHA regulations by using single bolts instead of double bolts when connecting steel members. The district court imposed criminal sanctions against the subcontractor, including a fine of $1 million and five years' probation, even though the ironworker was not the subcontractor's employee. The Court of Appeals affirmed, relying specifically upon the decisions in Beatty, Brennan and Teal:

> As courts have determined, the Act's legislative history suggests that its primary focus was making places of employment, rather than specific employees, safe from work related hazards. This implies that "once an employer is deemed responsible for complying with OSHA regulations, it is obligated to protect every employee who works in its workplace."

583 F.2d at 983. The Court used the term "multi-employer doctrine" when referring to the decisions which have allowed an employee to recover from an employer other than his own for injuries caused by violation of OSHA regulations. Like the Sixth Circuit Court of Appeals in Teal, the Court considered and rejected the decision of the Fifth Circuit Court of Appeals in Melerine:

> Therefore, the combination of Section 654(a)(2)'s broad language and the goal of safer workplaces have led courts to conclude that the multi-employer doctrine is fully consistent with the Act.
>
> However, while a majority of the courts to address the issue have come to this conclusion, at least one has not. [The subcontractor] relies on a decision from the Fifth Circuit, Melerine v. Avondale Shipyards, 659 F.2d 706

> (5th Cir. 1981), for the proposition that the multi-employer doctrine is incompatible with [OSHA]....
>
> Melerine, however, does not persuade us that the doctrine is an inappropriate byproduct of the Act's language or purpose. While the Fifth Circuit's reading of the language of Section 654(a)(2) is reasonable, we consider a less narrow interpretation of the duties it imposes more compelling...There is no reason to conclude that the specific protection Section 654(a)(2) affords – freedom from safety violations – is limited to an employer's own employees. This is particularly true when employees of different employers work in close proximity and all are subject to the risk those violations create.

Id.

F. The D.C. Circuit: On two recent occasions the Court of Appeals for the D.C. Circuit has considered the question of whether workers other than an employer's own employees are within the class of persons protected by the employer's duty to comply with OSHA regulations. On both occasions the Court noted the difficulty of the issue and the conflict among the circuits, but failed to reach a decision. Anthony Crane Rental, Inc. v. Reich, 70 F.3d 1298, 1304-07 (D.C.Cir.1995); IBP, Inc. v. Herman, *supra*, 144 F.3d at 864-66.

CONCLUSION

Pursuant to Rule 10 of the Supreme Court Rules, the Court should grant certiorari to resolve the conflict among the circuits as to whether workers other than an employer's own

employees fall within the class of persons to be protected by the OSHA regulations and the statutory provisions requiring the employer to comply with those regulations.

DATED this 30th day of November, 1999.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: _____
Jerome C. Scowcroft
Counsel of Record

#263684

No. _____

In The Supreme Court
of the
United States

October Term, 1999

LANCE E. FARR,
Petitioner,
vs.
NC MACHINERY CO.,
Respondent.

APPENDIX TO PETITION
FOR WRIT OF CERTIORARI

THE HONORABLE WALTER T. McGOVERN

__FILED __ENTERED
__LODGED__RECEIVED
SEP 10 1997 MR
AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

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SEP 26 1997
AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

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SEP 10 1997
Schwabe Williamson & Wyatt

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LANCE E. FARR, Plaintiff, vs. N C MACHINERY CO., a Washington corporation, Defendant.	IN ADMIRALTY No. C96-0023.M JUDGMENT (PROPOSED)

This action came on for trial before the Court, Honorable Walter McGovern, presiding, on August 26 and 27, 1997, and the issues having been duly tried and decision having been duly rendered,

IT IS ORDERED and ADJUDGED that plaintiff take nothing, that the action be dismissed on the merits, and the

defendant N C Machinery Co. recover from plaintiff its costs of action to be taxed by the clerk of Court.

DATED this ___ day of _____, 1997.

_____

UNITED STATES DISTRICT JUDGE

THE HONORABLE WALTER T. McGOVERN

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SEP 10 1997 MR
AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
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SEP 26 1997
AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
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Schwabe Williamson & Wyatt

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LANCE E. FARR, Plaintiff, vs. N C MACHINERY CO., a Washington corporation, Defendant.	IN ADMIRALTY No. C96-0023.M (PROPOSED) FINDINGS OF FACT AND CONCLUSIONS OF LAW

This non-jury admiralty action having come on for trial on August 26 and 27, 1997 and the Court having heard and reviewed the testimony of the witnesses, the evidence of record, the credibility of the witnesses, and the contentions and arguments of counsel the-Court, in accordance with Rule 52(a)

of the Federal Rules of Civil Procedure, makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. The Court adopts the following facts which %were admitted by both parties as set forth in the Pretrial Order:

a. The date of accident is September 11, 1994.

b. At the time of the accident, plaintiff was the master and his company was the managing owner of the F/V KEVLEEN K

c. Jerry Dean Buno was at all times material hereto an employee of defendant and acting within the scope of his duties.

d. Defendant's mechanic supplied the lifting link used to lift the engine.

e. When the engine block fell, plaintiff was struck in the face and chest and knocked to the deck, with the engine pinning his left foot to the deck. He suffered the following injuries as a result of this accident:

1. A fractured tooth, and damage to two other crowns;

2. A broken rib;

3. A severe contusion to the left thigh;

4. A complex fracture of Chopart's joint with partial dislocation of the talar head, an injury which included displacing the navicular medially and involved comminuted fractures of the navicular (schaphoid), tuboid, and base and proximal third metatarsal;

5. The end of the big toe was severed and the second toe suffered a severe crush injury with nail bed loss.

f. Plaintiff underwent the following medical treatment for the injuries which resulted from this accident:

1. The broken tooth was extracted and replaced with a bridge and the broken crowns replaced;

2. The rib was treated with support;

3. The foot injury was treated by open reduction of the dislocated talar head, including placing screws;

4. The toes were treated with a Syme's amputation of the great toe, removing the end of the toe and its nail bed, and suturing the second toe;

5. Following the surgery Captain Farr was placed in a cast and was not allowed to bear weight on his left foot until October 10, 1994;

6. Starting on October 10, about one month after the accident, Captain Farr remained in a removable cast and was allowed to begin bearing weight on his foot as tolerated. He remained in the removable cast for another month, and began using an orthotic some time in November, 1994. Finally Captain Farr was

released to work in January, although he was still experiencing some pain.

g. A total of $32,766.48 was incurred for plaintiff's medical treatment.

h. $2,535 was incurred for Captain Farr's medical evacuation flight.

i. Farr Fisheries, Inc. paid Captain Farr $2,650.00 in maintenance.

j. As a result of this accident, plaintiff now suffers from arthritis secondary to the comminuted fractures of the talar, navicluar and cuboid bones of the forefoot.

k. Plaintiff missed the fall 1994 King Crab, Cod and Bardi Crab seasons as a result of this accident. During these voyages, the relief master earned $53,403.74. Plaintiff's net loss after accounting for taxes is $38,450.69.

2. NC, a division of Tractor & Equipment, Inc., is a diesel engine sales and repair entity with facilities in Washington and Alaska. NC works extensively with the fishing industry. NC

maintains an office in Dutch Harbor which is permanently staffed with six mechanics. During the various fishing seasons, additional mechanics are often sent to the Dutch Harbor office because of the heavy work load. The Dutch Harbor office also provides support to various locations throughout western Alaska.

3. Captain Farr is 42 years old and has been fishing since he was 17. Captain Farr worked on several fishing vessels before joining the KEVLEEN K in 1975. He worked as engineer on the KEVLEEN K and became master of the vessel in 1979. He has also worked as master on several other vessels over the years. Through his company Farr Fisheries, Inc., Captain Farr is a part owner in the KEVLEEN K and the managing owner of the vessel.

4. Over the years, Captain Farr has taken a number of safety courses and is familiar with the Fishing Vessel Safety Manual. As master of the vessel, he is its safety officer.

5. The KEVLEEN K arrived in Dutch Harbor on September 11, 1994. The starboard auxiliary engine had failed

on the voyage from Seattle. The fishing season was about to start and it was important that the auxiliary engine be fixed as soon as possible. Captain Farr had contacted NC's office in Dutch Harbor and arranged for a mechanic to inspect the engine. NC's mechanic, Dean Buno, determined that the engine had to be rebuilt or replaced. Instead of overhauling the engine, Captain Farr elected to replace the engine with a new engine that was available in Dutch Harbor. Captain Farr also elected to have the vessel's crew do most of the labor involved in removing the old engine and installing the new engine.

6. Captain Farr and the vessel's chief engineer worked with NC's mechanic to disassemble and move the old engine from its mountings to a position below the engine room ladder. Lifting links were attached to the engine to suspend it in air while it was moved with the use of chain come-alongs.

7. The actions of the parties show that plaintiff, the vessel's crew, and defendant's mechanic were working together to remove the old engine when the accident occurred.

8. While the engine was being moved in the engine room, NC's mechanic attached a lifting ring to the front of the engine using a ½ inch bolt from the engine. When the engine was at the bottom of the ladder, two come-alongs were attached to the engine. One was lifting the front of the engine and was attached to a lifting eye in the overhead at the top of the ladder. The other was attached at the back of the engine and to the overhead in the engine room to keep the engine away from the ladder as it went up. The chief engineer went to the top of the ladder to operate that come-along while Captain Farr remained in the engine room operating the other come-along to hold the engine off the ladder.

9. When the engine was part way up the ladder, it was obvious that it would not fit up the ladder unless additional parts were removed. NC's mechanic and Farr removed-some additional parts from the engine block and the chief engineer used a cutting torch to remove some of the rungs from the ladder.

10. The engine was then raised up through the opening at the top of the ladder. When the engine was approximately 6 feet off the deck, the bolt on-the front of the engine came out of the engine block and the engine fell striking Captain Farr on the face and chest. Captain Farr was knocked to the deck, with the engine pinning his left foot to the deck.

11. While the engine was being raised, Captain Farr stepped to the bottom of the ladder immediately adjacent to the engine to see if it needed freeing up. Captain Farr knew that he was stepping into a position of danger when he stepped to the bottom of the ladder. In response to the Court's inquiry Captain Farr answered as follows:

> THE COURT: Why do you say you were not comfortable in stepping where you were just before?
>
> THE WITNESS (CAPT. FARR): Well, I was closer to the engine where I was, and, you know, if it did let loose, it would, you know, come down the stairs and get me. But I wanted to see on the backside, because

nobody could see on the backside what was happening when he was rocking the engine,

THE COURT: So are you saying you knew you were in a position of danger?

THE WITNESS (CAPT. FARR): I knew---yes, suspect to if the engine fell---you know, if it did fall like it did. I just---

12. The use of a lifting link with a 1/2 inch bolt in one of the center holes is the standard method used to raise engine blocks. The lifting link is listed in the Caterpillar manual for use in lifting up to 4000 lbs. NC's mechanic did not violate any safety statutes or regulations in using the lifting eye in this manner.

13. Captain Farr was negligent in that (a) as master of the vessel he was in charge of the vessel's crew and safety on the vessel; and (b) the vessel's engineer was raising the engine block and it apparently hung up on something. That it was apparently hung up was evidenced by the fact that plaintiff stepped to where he was because he wanted to see if the engine

needed freeing up, meaning that to him it seemed to be. Yet I do not have to decide why the bolt pulled out of the engine, and therefore make no finding, because I find that plaintiff's actions in stepping immediately adjacent to the engine block while it was being lifted could not have been anticipated and were the sole proximate cause of the accident.

14. After the accident, Farr submitted a claim to the vessel's P&I insurance for maintenance, cure and unearned wages. The medical expenses and maintenance were paid by the vessel owner, Kevleen K Partnership or its P&I insurer.

CONCLUSIONS OF LAW

1. This matter comes within the admiralty and maritime jurisdiction of this Court. 28 U.S.C. §1333.

2. Because the parties were working together to remove the old engine when the accident occurred, plaintiff has the burden of proving that the NC was negligent and that NC's negligence caused his injuries. Under general maritime law, the parties in this situation would owe each other a duty of reasonable care under the circumstances. See, Kermarec v.

Compagnie Generale Transatlantique, 358 U.S. 625 1959 AMC 597 (1959).

3. Plaintiff failed to carry his burden of proof to show by a preponderance of the evidence that the defendant was negligent.

4. Plaintiff failed to prove by a preponderance of the evidence that defendant breached any implied warranty of workmanlike service. Because I find that plaintiff failed to prove a breach of any implied warranty of workmanlike service, I do not have to decide whether plaintiff can recover under such a theory and whether defendant's Work Authorization (Defendant's Exhibit 20) excludes or limits any such implied warranty.

5. Plaintiff failed to prove by a preponderance of the evidence that defendant violated any safety statutes or regulations. Assuming, without deciding, that the Shipyard Industry Standards, 29 C.F.R. § 1915 et seq., apply in this case, the only regulation violated was by Captain Farr when he

stepped to the bottom of the ladder immediately adjacent to the engine block. 29 C.F.R. § 1915.116(j).

6. NC's mechanic had no duty to instruct Captain Farr on matters of common sense such as not stand immediately adjacent to or under the engine block while it was being lifted. Grover v. American President Lines, Inc., 1995 AMC 2105 (N.D. Calif. 1995)

7. Plaintiff's injuries were solely occasioned when he knowingly and volitionally stepped into the position where he was when struck by the engine. Plaintiff's actions were the sole cause of his injuries. See, Exxon Co. v. Sofec, Inc., 116 S. Ct. 1813, 1996 AMC 1817 (1996). Additionally, even if defendant were somehow under the facts presented determined to be negligent, which it wasn't, plaintiff's actions in placing himself where he did would constitute 100% comparative negligence.

8. Because I find that plaintiff has not proven defendant was negligent in any way, I do not have to decide if Captain Farr could recover medical expenses, maintenance and unearned wages paid by his employer or the vessel owner.

9. The Clerk of the Court is directed to enter judgment in favor of defendant NC machinery Co. As the prevailing party, defendant is entitled to its costs which shall be taxed by the clerk.

10. Any finding of fact deemed to properly be a conclusion of law is to be construed as such; any conclusion of law deemed to properly be a finding of fact is to be construed as such.

DATED this ___ day of _____, 1997.

_____
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LANCE E. FARR,

Plaintiffs,

vs.

N C MACHINERY CO., a Washington corporation,

Defendant.

No. C96-0023.M

MINUTE ORDER

__FILED __ENTERED
__LODGED__RECEIVED
SEP 26 1997
AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

The following minute order is made and entered on the docket at the direction of the HONORABLE WALTER T. MCGOVERN, UNITED STATES DISTRICT JUDGE:

Even if there was some negligence attributable to the defendant, and I have found none, plaintiff would still not prevail because in placing himself where he knowingly and wilfully did would, if the Court were to make a comparative negligence finding, be that the plaintiff was 100% comparatively negligent.

Plaintiff's motion for an order to show cause why the Court should not appoint an independent expert to determine the safety factor of the lifting mechanism used to lift the engine at the time of the accident involved in this claim is DENIED.

DATED this 26th day of September, 1997.

_____

Elva McGregor
Court Clerk to Judge McGovern

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LANCE E. FARR, *Plaintiff-Appellant,* vs. N C MACHINERY CO., a Washington corporation, *Defendant-Appellee.*	No. 97-36021 D.C. No. CV96-00023-WTM OPINION

Appeal from the United States District Court
for the Western district of Washington
Walter T. McGovern, Senior district Judge Presiding

Argued and Submitted
February 2, 1999---Seattle, Washington

Filed August 6, 1999

Before: Arthur L. Alarcon, Pamela Ann Rymer, and
Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Kleinfeld;
Dissent by Judge Rymer

SUMMARY

Admiralty/Negligence

The court of appeals vacated a judgment of the district court. The court held that in an admiralty negligence action, the doctrine of superseding intervening cause does not apply when the defendant sees the plaintiff in a position of obvious risk as he conducts the activity that results in injury to the plaintiff.

As master of a fishing vessel, appellant Lance Farr hired appellee NC Machinery Co. to repair an engine. NC's mechanic tried to remove the engine from the vessel by lifting it though a batch, using a single contact-a bolt---screwed 1/2 inch into an opening in the engine. To guide the engine through the hatch, Farr stood below it. The bolt sheared, and the engine fell on Farr, injuring him.

Farr sued NC in admiralty for negligence. His theory was that NC should have used a safer means to lift the engine. NC's mechanic testified he saw where Farr was, and that somebody had to stand close enough to the engine to place his hands on it and guide it through the hatch.

The district court rendered judgment for NC, applying the doctrine of superseding intervening cause, and concluding that Farr's actions in stepping adjacent to the engine while it was being raised could not have been anticipated and were the sole proximate cause of the accident. Farr appealed.

[1] Farr's failure to exercise reasonable care for his own safety could not have been a superseding intervening cause.

[2] Stepping adjacent to the engine as it was being lifted did not happen subsequent to NC's mechanic's negligence, but at the same time. A superseding cause generally has to happen after the negligence of the defendant. A superseding intervening cause is a force that is neither operating in the defendant's presence, nor at the place where the defendant's act takes effect at the time of the defendant's act, but comes into effective operation at or before the time of the damage. Superseding intervening cause is an expression of foreseeability. NC's mechanic could foresee that Farr would be below and adjacent to the engine because he actually saw him there as he raised. the engine.

[3] The very risk to be averted by a safer means of hoisting the engine was that someone standing close to it might be hurt if the bolt gave way. It was foreseeable and foreseen that someone might be standing close to it. The district judge's conclusion to the contrary was erroneous as a matter of law.

[4] Nor was the error harmless. Had the district court reached the question of whether there was any negligence by NC's mechanic, there was evidence from which it could have been found the there was.

Judge Rymer dissented, explaining that the court's review should have been for clear error, not de novo, as the majority appeared to assume.

COUNSEL

Jerome C. Scowcroft (briefed) Schwabe, Williamson & Wyatt, Seattle, Washington, for the plaintiff-appellant.

Paul N. Daigle (argued), Seattle, Washington, for the plaintiff-appellant.

Matthew C. Crane (briefed), Bauer, Moynihan & Johnson, Seattle, Washington, for the defendant-appellee.

Thomas G. Johnson (argued), Bauer, Moynihan & Johnson, Seattle, Washington, for the defendant-appellee.

OPINION

KLEINFELD, Circuit Judge:

This is an admiralty case involving comparative negligence and superseding intervening cause.

FACT

Captain Farr, the master of a fishing vessel, hired NC Machinery to repair an engine. The job was done in Dutch Harbor, Alaska, a busy place during the fishing season, so NC agreed to send a mechanic provided that the ship's crew would furnish necessary assistance. Though the crew and captain assisted, NC's mechanic directed them.

NC's mechanic tried to lift the engine out of the vessel through a hatch, using a single contact with the engine to bear

the half ton of weight. The contact was a bolt screwed a little over half an inch into a threaded opening on the engine. The engine had to be guided up from below as it went through the tight space. Captain Farr was at the bottom of the stairs, making sure the engine did not get hung up, and making sure it did not hit the vessel's alarm panel. When the engine was about six feet in the air, the bolt sheared, and the engine fell from the cable. It seriously injured Captain Farr, who was below and adjacent to it guiding it up. It hit him in the face, knocking out a tooth, broke a rib, bruised his thigh, and crushed his foot.

Captain Farr sued NC Machinery in admiralty for negligence. His theory was that NC's mechanic should have used a safer means of lifting the engine, such as a second lift point or safety harness around the engine. The district judge tried the case, and rendered judgment in favor of NC Machinery. The district judge made no finding about why the bolt had pulled out of the engine, which had been the subject of extensive expert witness testimony on both sides. He determined that he did not have to make any findings about the negligence if any of NC Machinery "because I find that plaintiff's actions in stepping immediately adjacent to the engine block while it was being lifted could not have been anticipated and were the sole proximate cause of the accident." Captain Farr appeals.

ANALYSIS

The district judge decided against Captain Farr based on the doctrine of superseding intervening cause. In his findings of fact, he found that Captain Farr's "actions in stepping immediately adjacent to the engine block while it was being

lifted could not have been anticipated and were the sole proximate cause of the accident." In his conclusions of law, the district judge held that Captain Farr's actions "were the sole cause of his injuries" under the recent Supreme Court decision in *Exxon Company v. Sofec, Inc.*, 517 U.S. 830 (1996).

But for the way the engine was lifted out of the ship, the accident would not have occurred, and if negligence in the means used allowed the engine to fall, that negligence was a substantial factor in causing the accident, so causation in fact was established.[1] The doctrine of assumption of the risk does not apply in admiralty, and "contributory negligence, however gross, is not a bar to recovery but only mitigates damages."[2]

Exxon Co. v Sofec, Inc.[3] holds that recovery was barred by the plaintiff's own conduct as superseding intervening cause, We therefore understand the district judge to mean that Captain Farr's conduct in standing below the engine adjacent to where it would fall was a superseding intervening cause that made it unnecessary to decide whether NC Machinery's mechanic was negligent, or to apportion damages according to the relative degrees of NC Machinery's fault and Captain Farr's own failure to exercise reasonable care for his own safety.

---

[1] *See* Judge T.G. Nelson's thoughtful concurrence in *Sementilli v. Trinidad Corp.*, 155 F.3d 1130, 1135-1141 (9th Cir. 1998), on this and the other causation questions at issue.

[2] *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 431 (1939); *Pan Alaska, Etc. v. Marine Construction and Design Co.*, 565 F.2d 1129 (9th Cir. 1977).

[3] *Exxon Co. v. Sofec, Inc.*, 517 U.S. 830 (1996).

In *Sofec*, an Exxon oil tanker broke free of a mooring system manufactured by Sofec. After it broke free, the captain struggled for almost three hours to deal with the problem, but neglected to have anyone plot where the ship was. Because he did not know where he was, the captain ran the ship onto a reef. Exxon sued the manufacturer of the mooring system for the damage to its vessel from being run up on the reef. It lost trial and in the Supreme Court, on the theory that the captain's negligence was a superseding intervening cause that prevented the manufacturing defect if any from being the proximate cause of the accident.

Exxon argued in the Supreme Court that superseding intervening cause doctrine does not apply in admiralty. Its theory was that because *United States v. Reliable Transfer Co.* held that liability for damages "is to be allocated among the parties proportionately to the comparative degree of fault,"[4] superseding cause doctrine must have been implicitly abolished in admiralty as inconsistent with this principle. The Court rejected this argument, and held that superseding intervening cause doctrine does apply in admiralty. The doctrine relates to proximate cause, not allocation of damages. Superseding intervening cause doctrine and pure comparative negligence are not inconsistent with each other, because "a later cause of independent origin that was not foreseeable" cuts off the proximate causation of the defendant's negligence.[5]

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[4] *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411 (1975). *See also Shellman v. United States Lines, Inc.*, 528 F.2d 675 (9th Cir. 1975).

[5] *Sofec*, 517 U.S. at 837.

Sofec says that in ruling upon proximate cause and superseding intervening cause, admiralty courts "may draw guidance from, *inter alia*, the extensive body of state law applying proximate causation requirements and from treatises and other scholarly sources," as "'illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other.'"[6] *Sofec* was a claim against a manufacturer for a product defect. The Court noted that because the breach of warranty claim against the manufacturer was contractual, foreseeability doctrine "may be more stringent" than in tort, and the limited review of application of law to fact did not justify reversal of the superseding intervening cause finding.

[1] In the case at bar, the district Court erred in its application of *Sofec*. The trial judge found that Captain Farr was negligent, that is, that he failed to exercise reasonable care for his own safety, by stepping into a position immediately adjacent to the engine when it apparently snagged on something. We do not set aside that finding as clearly erroneous. But as a matter of law, Captain Farr's failure to exercise reasonable care for his own safety cannot in this case be a superseding intervening cause.[7]

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[6] *Sofec*, 517 U.S. at 839.

[7] We agree with Judge Rymer that our review is "limited," *Sofec*, 517 U.S. at 941, and that we review the district court's proximate cause determination "under the clearly erroneous standard." *Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 576 (9th Cir. 1995), *aff'd* 517 U.S. 830 (1996). But that does not mean no review at all. A correct reading of the doctrine of superseding intervening cause does not allow for what the district court stated as a conclusion of law (rather than finding of fact) that "[p]laintiff's

[2] One reason that Captain Farr's stepping adjacent to the engine as it was being hoisted cannot be a superseding intervening cause is that it did not happen subsequent to NC's mechanic's negligence, but at the same time. A superseding cause generally has to happen after the negligence of the defendant. *Sofec* describes superseding intervening cause as a later cause as independent origin that was not foreseeable."[8] The word "later" means that the superseding intervening cause has to occur after the defendant's negligence. The Restatement likewise says that the defendant's negligence, to be cut off as a proximate cause by a superseding intervening cause, has to be "antecedent" to the superseding intervening cause. "A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his *antecedent* negligence is a substantial factor in bringing about."[9] "An intervening force is one which actively operates in producing harm to another *after* the actor's negligent act or omission has been committed."[10] In the classic academic formulation, a superseding intervening cause "is a force which is neither operating in the defendant's presence, *nor* at the place where the defendant's act takes effect *at the time of the defendant's act*, but comes into effective

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actions were the sole cause of is injuries," which its citation of the superseding intervening cause decision in *Sofec* showed was based on superseding intervening cause. Because of a misapprehension of the law, the district court clearly erred in treating Captain Farr's failure to exercise care for his own safety as a superseding intervening cause.

[8] *Sofec*, 517 U.S. at 837.

[9] Restatement (Second) of Torts § 440 (emphasis added).

[10] Restatement (Second) of Torts § 441 (emphasis added).

operation at or before the time of the damage."[11] Though there are exceptions to this chronological requirement,[12] it is in most cases significant, because the doctrine of superseding intervening cause is at bottom an expression of the requirement of foreseeability.[13] A defendant's power of foresight necessarily embraces what he can see with his own eyes as he acts. NC's mechanic could foresee that Captain Farr would be below and adjacent to the engine, because he actually saw him there as he raised the engine.

The Restatement lists a number of "Considerations Important in Determining Whether an Intervening force is a Superseding Cause."[14] Every one of these considerations cuts

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[11] McLaughlin, Proximate Cause, 39 Harv. L. Rev. 149, 159 (1925) (emphasis added).

[12] *See* Restatement (Second) of Torts § 441 cmt. a.

[13] Robert E. Keeton, Legal Cause In the Law of Torts 38-41 (1963).

[14] Consideration Important in Determining Whether an Intervening Force is a Superseding Cause

> The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another:
>
> (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
>
> (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
>
> (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;

against treating Captain Farr's negligence as a superseding intervening cause. The harm that occurred was not "different in kind" from what the mechanic's negligence would otherwise have caused.[15] It was the same harm, that the engine might fall on somebody and hurt him if the single bolt holding the cable on failed. There was nothing "extraordinary" about what happened; it was just what might be expected of an inadequately careful hoisting method, that the load might fall and someone might be standing too close to it and get hurt.[16] The intervening force was not "operating independently" of the risk created by the hoisting technique; they operated together.[17] The operation of the intervening force was not caused by a "third person's act," but by the victim's act.[18] The intervening force was not "wrongful," but merely a failure of the victim to exercise reasonable care for his own safety.[19] There was no "culpability of a wrongful act of a third person," both because

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(d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;

(c) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;

(f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

[15] Restatement (Second) of Torts § 442(a).

[16] Restatement (Second) of Torts § 442(b).

[17] Restatement (Second) of Torts § 442(c).

[18] Restatement (Second) of Torts § 442(d).

[19] Restatement (Second) of Torts § 442(e).

there was no wrongful act and because Captain Farr was not a third person to the occurrence.[20]

Two of the illustrations in the Restatement bear some similarity to the case at bar. If the defendant negligently leaves an unprotected excavation on the sidewalk, and a person falls into it and gets hurt, the defendant is not screened from liability because another passerby negligently bumped the victim into it.[21] And if the defendant negligently stacks a load on his truck so that a slight jolt will make it fall, and it falls on someone and hurts him, the defendant is not screened because a boy tried to climb on the truck and disturbed the load.[22] In both cases, the intervening occurrence is foreseeable and the risk that materialized was the one threatened by the negligence, as in the case at bar. In both there is no superseding intervening cause. Likewise, where rafters from a partially constructed building fell on workers during a strong wind because the contractors failed to brace them, the wind could not be a superseding intervening cause because "[t]he very risk that is sought to be averted by bracing the bays first is collapse due to wind."[23]

[3] In the case at bar, the very risk to be averted by a safer means of hoisting the engine was that someone standing close to it might be hurt if the bolt gave way. It was foreseeable (and not only foreseeable but seeable --- the

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[20] Restatement (Second) of Torts § 442(f).

[21] Restatement (Second) of Torts § 442 B cmt. b, illus. 5.

[22] Restatement (Second) of Torts § 442 cmt. a, illus. 1.

[23] *Young v. Environmental Air Products, Inc.*, 665 P.2d 88, 94-95 (Ariz. App. 1982).

mechanic saw where Captain Farr was and continued hoisting the engine, without telling him to get out of there) that someone might be standing close to it. Indeed, the NC mechanic testified that the harm and the way it materialized was not only foreseeable but that he foresaw it. He said, of guiding the engine out of the hatch, "Somebody has to watch and make sure it doesn't hang up, hook on something, damage something." Asked if he had anticipated that someone would have to "stand close enough to this engine to put your hands on it and guide it out," he said "Yeah, from the bottom and the top both." In these circumstances, that Captain Farr did stand close enough to the engine, below it, to guide it out and assure that it was not breaking the vessel's alarm panel, could not be a superseding intervening clause. The district judge's conclusion of law to the contrary was erroneous as a matter of law.

[4] Nor was the error harmless. Had the district court reached the question of whether there was any negligence by NC's mechanic, there was evidence from which he could have found that there was. An expert witness with substantial personal experience as well as academic knowledge testified that it is a bad idea to use a single lifting point for a cast iron block engine, because there is no way to know the strength of the material and no margin for error. He testified that in every case where he had looked at an engine being hoisted, there was a bridle or sling underneath it, or else multiple attachment points for the lifting apparatus. Another witness, experienced in lifting marine engines, testified that the salt water tends to corrode the cast iron of the blocks, so two attachment points for picking up the engine are "absolutely required." After Captain Farr went to the hospital, and the mechanic again hoisted the engine, this time successfully, the mechanic put a strap around

the flywheel, as well as a bolt in a different hole, which proves that it was possible to use multiple lifting points, and to attach a safety strap as well as a bolt. Plaintiff also introduced evidence that the bolt hole that failed showed wear, and that even had it been in perfect condition it would have had only just enough strength to bold the weight of the engine.

Plaintiff also argues that there was negligence per se because or violation of the OSHA safe place to work requirement, but this argument is without force because the regulation only applies to employers with respect to their employees, not to non-employment relationships such as NC's to Captain Farr.[24] Plaintiff also argues that the stripped threads on the bolt hole, made negligence of NC's mechanic *res ipsa loquitur*, but that cannot be so, because sometimes parts fail without any negligence by a person working with them. But plaintiff does not need either of these arguments to establish negligence on the part of the mechanic.

Because the district judge did not make findings on the existence and proportion of NC's negligence, we vacate the judgment and remand so that he can do so, and make such additional findings on damages as may be necessary.[25] Costs in favor of plaintiff-appellant.

VACATED AND REMANDED

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[24] 29 U.S.C. § 654(a)(1); 29 C.F.R. § 1915.3(a).

[25] *Irish v. United States*, 225 F.2d 3 (9th Cir. 1955).

RYMER, Circuit Judge, dissenting:

I part company because our review of whether Captain Farr's negligence was a superseding intervening cause should be for clear error, not de novo as the majority appears to assume. "A district court's findings of negligence, including issues of proximate cause, are reviewed under the clearly erroneous standard." *Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 576 (9th Cir. 1995), *aff'd*, 517 U.S. 830 (1996). As the Supreme Court emphasized, "[t]he issues of proximate causation and superceding cause involve application of law to fact, which is left to the factfinder, subject to limited review." *Exxon*, 517 U.S. at 840-41. Simply because we might apply the Restatement factors for determining "superseding intervening cause" differently to the facts does not mean that the district court erred as a "matter of law." *See ante* at 8797, 8800.

Following a two day bench trial the district court found that "Farr's actions in stepping immediately adjacent to the engine block while it was being lifted could not have been anticipated and were the sole proximate cause of the accident." This finding was based on evidence that, for one reason (*e.g.*, he feared the engine would smash the nearby alarm panel) or another (*e.g.*, he thought the engine was "caught up" on the engine room ladder), Captain Farr disregarded both his years of training and his common sense by purposefully stepping dangerously close to the swinging engine. He did this without alerting either Buno (the NC mechanic, who had turned to retrieve his tools) or his engineer, Graybeal, who was operating the overhead hoist on the deck above. Because doing so ran counter to training, and was out of the ordinary, I don't see how we can say as a matter of law that there was nothing

"extraordinary" about what happened. Rather, it seems to me, the district court who heard the evidence was within its discretion in determining that Farr's sudden relocation to within the fall radius of the suspended engine block was not "normal" or "reasonably foreseeable." See *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 497 (9th Cir. 1991) (holding a negligent intervening action supersedes prior negligence where the latter action is "neither normal nor reasonably foreseeable").

I would, therefore, affirm.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LANCE E. FARR,

Plaintiff-Appellant,

vs.

N C MACHINERY CO., a Washington corporation,

Defendant-Appellee.

No. 97-36021

D.C. No. CV96-00023-WTM

ORDER

Before: ALARCON, RYMER, and KLEINFELD, Circuit Judges.

Appellant's petition for rehearing filed August 24, 1999, is hereby DENIED.

Appellee's motion to substitute amended petition for rehearing filed September 1, 1999, is GRANTED. The amended petition for rehearing is hereby DENIED.